Supreme Court, U.S.
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No. 86-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TRINIDAD CORPORATION,
Petitioner,

v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of the State of New York, First Judicial Department

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BRIEF FOR RESPONDENT IN OPPOSITION

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DATED: November 24, 1986

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QUESTION PRESENTED FOR REVIEW

Whether the court below properly found that an arbitration award rendered by former United States Secretary of Labor W. J. Usery, Jr. "drew its essence" from the MEBA-Trinidad collective bargaining agreement, such that the court was "bound to enforce the award" and was "not entitled to review the merits of the contract dispute" under *W. R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757, 764 (1983).

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v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
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On Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of the State of New York, First Judicial Department

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE [1]

This is a proceeding to confirm an arbitration award rendered by former United States Secretary of Labor W. J. Usery, Jr. under a collective bargaining agreement. Petitioner nonetheless did not provide the Court with a copy of Secretary Usery's meticulous opinion and

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[1] Except where otherwise indicated, the facts in the counterstatement are taken from the record on appeal filed with the court below.

award, and otherwise obscures the true nature of this case. We are accordingly compelled to set out below a detailed statement of the relevant facts.

Respondent District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO ("MEBA") is a labor organization primarily engaged in representing licensed officers who serve as supervisory marine engineers aboard ocean-going vessels. MEBA and petitioner Trinidad Corporation ("Trinidad") were parties to a 1981-1984 collective bargaining agreement ("MEBA-Trinidad Agreement" or "the Agreement") governing the wages, hours and working conditions of the latter's engineers. The Agreement expired on June 15, 1984 and has not been renewed. Accordingly, no agreement has existed between the parties for over two years.

By its terms, the MEBA-Trinidad Agreement covered "all licensed marine engineers employed on U.S. flag ocean-going tanker vessels * * * owned or operated * * * by [Trinidad], or its subsidiary or affiliate, or by an entity for which [Trinidad] acts as a bargaining agent." The term "subsidiary" or "affiliate" was defined in Section 36 of the Agreement as:

> * * * any business entity whether corporate, partnership, trust or individual which is effectively controlled by or effectively controls [Trinidad] either directly or indirectly.

In October 1983, MEBA served Trinidad with a demand for arbitration of a grievance which alleged that certain sister companies of Trinidad (Apex Oil Co., Crest Tankers, Inc. and Clayton Tankers, Inc.) were its "subsidiaries" or "affiliates," such that the marine engineering work being performed by those companies was covered by the Agreement.[2] By way of remedy, the

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[2] These affiliates are hereinafter respectively referred to as "Apex," "Crest" and "Clayton."

grievance sought to recapture this work, and to make MEBA members whole for losses resulting from Trinidad's contract breach.

MEBA's grievance was submitted to former United States Secretary of Labor W. J. Usery, Jr., the permanent arbitrator selected by Trinidad and MEBA.[3] After securing a continuance of the arbitration hearing from Secretary Usery, Trinidad sued to enjoin the arbitration in federal district court in the District of Columbia. On Friday, November 4, 1983, the district court issued an order enjoining the arbitration on the grounds that the court needed time "to determine if it has subject matter jurisdiction hereof, and if the matters presently scheduled for arbitration on November 9, 1983 are properly arbitrable." (App. A at 2a).

The following Monday morning, MEBA filed an emergency motion to set aside the district court's order, which the Court of Appeals granted on Tuesday, November 8. *In Re District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association*, 723 F.2d 70 (D.C. Cir. 1983) (opinion by Edwards, J.). The Court of Appeals held that it was "absolutely clear" that the district court was "without jurisdiction" to enjoin the arbitration, and that its injunction in any event constituted a "clear abuse of discretion" requiring reversal:

> Simply stated, the action of the District Court was almost wholly inconsistent with well-established law regulating collective bargaining, the enforcement of collective bargaining agreements, and relations between the judiciary and labor arbitrators in the private sector.

Id. at 76, 77. The Court of Appeals accordingly vacated the district court's injunction, "so as to allow arbitration

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[3] The Agreement provided in pertinent part that "[a]ll disputes relating to the interpretation or performance" of the Agreement shall be submitted to binding arbitration.

to proceed as scheduled" on November 9 before Arbitrator Usery, "a former Secretary of Labor and well-known expert in collective bargaining." *Id.* at 73, 79.[4]

On December 23, 1983, Secretary Usery issued a detailed opinion sustaining the grievance.[5] He concluded that Trinidad's sister companies in fact were its " 'subsidiaries' and 'affiliates' " within the meaning of Section 36 of the Agreement, and that those companies' marine engineering work was covered by the Agreement. (App. B at 11a-12a).[6] The New York Supreme Court confirmed Secretary Usery's award in a decision dated November 14, 1984. In its decision, the Supreme Court first discussed the heavy burden under federal law which Trinidad had to shoulder in order to overturn Secretary Usery's award:

> Under well-established Federal Labor Law principles, unless Trinidad convincingly demonstrates that the arbitration decision does not "draw its essence" from the Trinidad-MEBA collective bargaining agreement, the Court "is bound to enforce the award and is not entitled to review the merits of

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[4] On November 9, 1983, Trinidad filed an Application to Vacate the Court of Appeals' Order with then-Chief Justice Burger, who summarily denied the Application the same day. (Docket No. A-357). On January 10, 1984, Trinidad voluntarily dismissed its action pursuant to Fed.R.Civ.P. 41(a)(1)(i).

[5] Secretary Usery's opinion and award are reproduced in full in Appendix B to this brief.

[6] As Trinidad notes in its petition, after Arbitrator Usery issued his award, Crest filed unfair labor practice charges alleging that MEBA violated the National Labor Relations Act by peacefully processing its grievance through arbitration. On September 24, 1986, NLRB Administrative Law Judge Itkin issued a decision finding (as had Arbitrator Usery) that Crest and Trinidad were alter egos and dismissing Crest's charges in their entirety. Judge Itkin's decision is presently on appeal to the NLRB.

> the contract dispute." *W. R. Grace and Co.* v. *Local Union* 759, 461 U.S. 757, 103 S. Ct. 2177 (1983).

(App. B to Pet. at 4a-5a).

After reviewing Secretary Usery's findings and conclusions as to whether Trinidad and its sister companies were "subsidiaries and affiliates" under Section 36 of the Agreement, the court found them to be consistent with the meaning of that Section. Secretary Usery's determination in that regard was "within his province," and it was not for the court "to decide whether it would have done the same." (*Id.* at 5a).

The New York Supreme Court accordingly confirmed the award in full and directed:

> a) That Trinidad immediately cause Apex Oil[,] * * * Crest and Clayton to execute the agreement.
>
> b) That Trinidad immediately apply the terms of the agreement to all licensed marine engineers employed on all vessels owned and operated by Crest or Clayton.
>
> c) That Trinidad pay back wages and fringe benefit contributions for all licensed marine engineers employed on all vessels owned or operated by Crest and/or Clayton from the time said vessels were acquired until such time as the licensed marine engineers employed thereon are covered by the agreement.

(*Id.* at 4a).

Paragraphs (a) and (b) of the award and judgment, relating to Trinidad's obligation to extend the MEBA-Trinidad Agreement to Crest's marine engineering work, are now moot: the Agreement expired on June 15, 1984 and has not been renewed. As a consequence, no MEBA agreement exists which could be so extended.[7]

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[7] Issues concerning the backpay and benefits portion of Secretary Usery's award are still in litigation before the New York state

Trinidad appealed the court's judgment to the Appellate Division of the New York Supreme Court, First Judicial Department, which affirmed in a unanimous decision issued January 21, 1986. On July 8, 1986, the New York Court of Appeals denied Trinidad's Motion for Leave to Appeal.

REASONS WHY THE PETITION SHOULD BE DENIED

Introduction

Trinidad's entire argument in support of its Petition rests on its contention that there is a conflict among the federal courts of appeals concerning the availability of multipartite arbitration. In what follows, we first demonstrate that the question Trinidad presents for review does not turn on resolution of the claimed conflict; rather, that question is resolved by reference to the well-settled rule that where parties to a labor contract have agreed to arbitrate disputes arising under the contract, the reviewing court should enforce the arbitrator's ruling so long as it draws its essence from the contract. We then show that the question Trinidad presents was not decided below and is not the subject of intracircuit conflict.

A. The Record In This Case Does Not Raise The Question Trinidad Presents

According to Trinidad, the question presented for review is whether a labor arbitration award rendered pursuant to a collective bargaining agreement is unenforceable under Section 301 of the Labor Management Relations Act when the award "applies" to entities not signa-

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courts. The amount of lost wages and benefits owed by Trinidad was determined by Secretary Usery in a supplemental award issued in August, 1985. That supplemental award was confirmed by the New York Supreme Court and is presently pending before the Appellate Division.

tory to the agreement. But even a cursory reading of Secretary Usery's award makes clear that it does not "apply" to or bind any entity other than Trinidad. Arbitrator Usery's analysis was lucid and straightforward. He stated that:

> The Company has argued that the Arbitrator does not have jurisdiction to determine the "rights or obligations of corporations, labor organizations, or individuals who are not signatories to the contract from which the arbitrator derives his authority" (Brief of the Company, page 6). This is unquestionably true, and *this Arbitrator does not seek to determine the rights or obligations of nonsignatory parties. The Arbitrator's authority in this case is restricted to the determination of the rights and obligations of those who are parties to the Agreement.*

(App. B at 6a (emphasis added)).

Thus, on this record, Trinidad's petition is reduced to the proposition that the award should be set aside because other entities may be affected by Secretary Usery's enforcement against Trinidad of a bargain which it freely made. That position was uniformly and inevitably rejected by the courts below. As those judges recognized, the sole and unexceptional issue in this case is the traditional one, namely, whether Arbitrator Usery's award "drew its essence" from the collective bargaining agreement, such that the court was "bound to enforce the award" and was "not entitled to review the merits of the contract dispute" under the rules established in the *Steelworkers Triology*[8] and reaffirmed in *W. R. Grace & Co.* Trinidad nowhere argues that Arbitrator Usery's award does not "draw its essence" from the Trinidad-BEBA Agreement. Accordingly, the petition raises no important issue of federal law warranting review by this Court.

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[8] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

B. This Case Does Not Present An Issue Concerning The Propriety Of Multipartite Arbitration

In an effort to attract this Court's attention, Trinidad invokes a line of decisions stemming from *CBS* v. *American Recording & Broadcasting Association*, 414 F.2d 1326 (2d Cir. 1969), and asserts that "the instant petition should be granted to clarify any misconceptions that the lower courts have with respect to this Court's position on the issue of multipartite arbitration." (Pet. at 11). But this case presents no genuine issue concerning multipartite arbitration, for three independent reasons.

First, and most fundamentally, Trinidad did not preserve any request for multipartite arbitration in its appeal to the Appellate Division, which consequently did not pass on the propriety of such a request. Therefore, Trinidad may not raise in this Court the claimed conflict as to judicial authority to order multipartite arbitration. *E.g.*, *State Farm Mutual Insurance Co.* v. *Duel*, 324 U.S. 154, 160 (1945); *Ungar* v. *Sarafite*, 376 U.S. 575, 582-583 (1964).[9]

Moreover, if this case ever presented a live controversy concerning the propriety of multipartite arbitration, that issue became moot in June 1984 when the Trinidad-MEBA Agreement expired. Thereafter, there was no contract to "apply" to Crest and no possibility that Crest could be subject to conflicting demands; all that remained was an order directing Trinidad to compensate MEBA's members for the work they lost. See n. 7, *supra*. In these circumstances, any request by Trinidad for multipartite arbitration is now moot. *See Local 201* v. *Shaker, Travis & Quinn, Inc.*, 709 F.2d 178 (2d Cir. 1983), *vacating* 555 F. Supp. 314 (S.D.N.Y. 1983).

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[9] Trinidad implicitly concedes as much by not asking this Court to review any refusal by the court below to order multipartite arbitration.

Finally, the propriety of multipartite arbitration has been recognized only where (as in *CBS* and its progeny) the underlying dispute is jurisdictional in nature. In the classic jurisdictional dispute, an employer promises one type of work (*i.e.*, plumbing) to one union and another type of work (*i.e.*, electrical) to another. In that circumstance, only one group of employees is entitled to perform the work and resolution of the dispute turns on whether the work is plumbing work or electrical work. By contrast, Trinidad promised that MEBA's members would perform *all* the marine engineering work for Trinidad and its subsidiaries and affiliates, including Crest. According to Trinidad, Crest thereafter promised its marine engineering work to another group of supervisory marine engineers. If so, one group of engineers is entitled to perform Crest's work and the other is entitled to damages. *See W. R. Grace & Co.*, 461 U.S. at 768 n.12 ("Economic necessity is not recognized as a commercial impracticability defense to a breach of contract claim," but is the price one pays for assuming conflicting contractual obligation).

The difference in the two types of cases discussed above is analogous to the difference between (1) the situation where a seller contracts to sell all his diamonds to Buyer A and all his zirconium to Buyer B, and both A and B claim entitlement to a given stone; and (2) the situation where a seller contracts to sell "Blackacre" to two different buyers. In the former situation, a court must decide whether the stone is a diamond or zirconium, and award it to the appropriate buyer. In the latter situation, both buyers are entitled to judgment, one for specific performance and one for damages. *Id. CBS* falls into the former category; this case falls into the latter.

C. No Conflict Exists As To The Availability Of Multipartite Arbitration

Trinidad's assertion (Pet. at 8) that there is an intracircuit conflict regarding the "appropriateness" of multi-

partite arbitration is specious. According to Trinidad (Pet. at 11-12), the Second Circuit "approved" multipartite arbitration in *CBS*, and the Third and Tenth Circuits have followed *CBS*. The sole court of appeals case claimed to be in conflict is that of the District of Columbia Circuit earlier in this litigation (*see* pp. 3-4 *supra*).

Trinidad baldly asserts (Pet. at 13) that the District of Columbia Circuit "expressly refused to order multipartite arbitration" in *In re District No. 1*. That assertion is flatly wrong because the District of Columbia Circuit was not there confronted with the propriety of ordering multipartite arbitration. The district court order appealed from did not direct such an arbitration, but merely enjoined the scheduled bilateral arbitration "for the time necessary to enable the Court to determine if it has subject matter jurisdiction hereof, and if the matters presently scheduled for arbitration on November 9, 1983 are properly arbitrable." (App. A at 2a).[10] Accordingly, the District of Columbia Circuit did not disagree with the Second or any other Circuit concerning the authority of the courts to order multipartite arbitration. Instead, it simply held that the issuance of an injunction against bilateral arbitration for the reasons advanced by the district court violated the Norris-LaGuardia Act and constituted a clear abuse of discretion.

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[10] Indeed, Trinidad conceded in the district court that, because neither CTOA nor Crest had agreed to participate in such an arbitration, the court "lack[ed] the power to force the parties into a joint arbitration proceeding." (Trinidad Memorandum in Support of Motion for Temporary Restraining Order at 8). For that reason, Trinidad urged the district court to decide the merits of the MEBA grievance, asserting that the district court was "the appropriate, indeed the only, forum in which this dispute can be resolved." (*Id.* at 11).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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November 24, 1986

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3257

TRINIDAD CORPORATION,
Plaintiff,

v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

and

CREST TANKER OFFICERS' ASSOCIATION,
Defendants.

Civil Action No. 83-3297

CREST TANKERS, INC. and CLAYTON TANKERS, INC.,
Plaintiffs,

v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
(AFL-CIO),
Defendant.

[Filed Nov. 4, 1983]

TEMPORARY RESTRAINING ORDER

Upon consideration of the motions of plaintiffs Trinidad Corporation ("Trinidad"), Crest Tankers, Inc. ("Crest") and Clayton Tankers, Inc. ("Clayton"), for a temporary restraining order enjoining the arbitration of a dispute between plaintiff Trinidad and defendant District 1—Pacific Coast District Marine Engineers' Beneficial Association, AFL-CIO ("MEBA"), with respect to the coverage of the collective bargaining agreement described in the complaint in Civil Action No. 83-3257 as the "Tanker Vessels Agreement," pursuant to defendant MEBA's demand therefor contained in the letter of its general counsel of October 11, 1983, and of defendant MEBA's opposition thereto, and of the oral argument and representations of counsel thereon of November 3 and 4, 1983, in open court; and it appearing to the Court that plaintiff has shown sufficient indication of imminent irreparable harm and the likelihood of prevailing on the merits to warrant the preservation of *status quo* for the time necessary to enable the Court to determine if it has subject matter jurisdiction hereof, and if the matters presently scheduled for arbitration on November 9, 1983 are properly arbitrable,[1] while defendant has failed to demonstrate that it will suffer any substantial hardship thereby, and the Court being of the opinion that both the public interest and the interest of justice are best served by an orderly and deliberate consideration of the issues presented following hearing of plaintiffs' applications for a preliminary injunction, it is, this 4th day of November, 1983, at 6:00 p.m., o'clock,

ORDERED, that plaintiffs' motions for a temporary restraining order are granted; and it is

FURTHER ORDERED, that defendant District 1—Pacific Coast District, Marine Engineers' Beneficial As-

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[1] *See United States* v. *United Mine Workers of America*, 330 U.S. 258, 289-95 (1947).

sociation, its officers, agents, servants, employees, and attorneys, and all others in active concert or participation with it, are ordered to refrain from any further prosecution of the arbitration proceedings aforesaid, or efforts to compel the same in any forum other than this Court, with respect to any of the matters presently scheduled for presentation to the arbitrators on November 9 and 10, 1983, in New York City, provided, however, that plaintiff shall first post cash, or injunction bond appropriately conditioned, in a principal amount of $10,000.00, by 4:30 p.m., November 7, 1983, and shall cause a copy of this order to be personally served forthwith upon defendant and upon W.J. Usery, Jr., Arbitrator; and it is

FURTHER ORDERED, that hearing of plaintiffs' motions for a preliminary injunction is scheduled before this Court on November 14, 1983 at 10:00 a.m. o'clock; and it is

FURTHER ORDERED, that unless earlier dissolved, modified, or extended, this order shall expire on Monday, November 14, 1983 at 6:00 p.m. o'clock.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX B

DECISION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN:

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
AFL-CIO

—and—

TRINIDAD CORPORATION

Appearances:

For Marine Engineers' Beneficial Association ("Union"):

Ira Mitzner, Counsel

For Trinidad Corporation ("Company"):

Adin Goldberg, Counsel

The Union and the Company are parties to an Agreement executed in 1981 covering Company supervisors (licensed marine engineers) employed on 17 vessels owned and/or operated by the Company. Section 36(b) of that Agreement seeks to bind all affiliates and subsidiaries of the Company to the Agreement. Two allegedly affiliated companies, Crest Tankers Inc. ("Crest"), and Clayton Tankers, Inc. ("Clayton") were formed by the Company's parent corporation after it (the Company) entered into the Agreement with the Union. Those af-

filiates (Crest and Clayton) own and/or operate 8 vessels which are similar to and carry the same type of cargo as the Company's 17 owned or operated vessels. The Company has refused to bind Crest and Clayton to its Agreement with the Union.[1] The Union alleges that the Company's refusal is a breach of the Agreement, and has initiated this arbitration to settle that dispute.

The initial hearing in this case was held on October 19, 1983. On that date, counsel for Trinidad requested a continuance, which was granted by the Arbitrator. The hearing was re-scheduled for November 9, 1983. During this period, the Company sought and was granted a temporary restraining order in Federal District Court on November 4, 1983, to prevent the holding of the arbitration hearing. This order was vacated by a two-member panel of the U.S. Court of Appeals for the District of Columbia Circuit on November 8, 1983. The hearing took place as scheduled, on November 9, 1983.

Counsel for both the Union and the Company were in attendance when the hearing was re-opened. Both parties were given ample opportunity to present their arguments, both at the hearing and in post-hearing briefs. There is, therefore, no justification for delaying this decision on the ground that one side or the other has not had sufficient time or opportunity to present its case.

Two fundamental issues must be decided by the Arbitrator in this case.[2] First, the Arbitrator must decide if

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[1] These licensed marine engineers employed by Crest are covered by an agreement (executed on October 29, 1983) with the Crest Tankers Officers Association. The Company contends, therefore, that it can't cover their engineers under the Agreement with the Union.

[2] The Company argues that the Union waited too long to assert its grievance and that the case should be dismissed under the doctrine of latches. The Union contends it learned of facts supporting its grievance only weeks before it filed the grievance. I decline to apply the latches defense, noting that the Agreement con-

he has jurisdiction, under the terms of the collective bargaining Agreement, to decide this case. Second, if the Arbitrator decides he does have jurisdiction, he must make a decision on the merits of the case. These issues will be dealt with separately.

Jurisdiction of the Arbitrator

The Company has argued that the Arbitrator does not have jurisdiction to determine the "rights or obligations of corporations, labor organizations, or individuals who are not signatories to the contractor from which the arbitrator derives his authority" (Brief of the Company, page 6). This is unquestionably true, and this Arbitrator does not seek to determine the rights or obligations of non-signatory parties. The Arbitrator's authority in this case is restricted to the determination of the rights and obligations of those who *are* parties to the Agreement.

This determination hinges on the question of whether certain business entities (i.e., Crest Tankers, Inc., and Clayton Tankers, Inc.) are, in fact, parties to and bound by the Agreement by virtue of their relationship with Trinidad Corporation. The Company (Trinidad) argues that these other entities are entirely separate and do not represent "alter egos" of Trinidad. According to the Company, since these other entities are separate, and have their own labor agreements, the Arbitrator does not have the authority to arbitrate a decision which would in any way determine the rights and obligations of these other entities.

The Company's argument is essentially that this is a dispute more properly resolved in a different forum. The

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tains no time limit, that the Company does not appear to have been harmed by any delay, that the Union's explanation is plausible, and that the Union, even if it knew all the facts months ago, could reasonably assume that the Company would comply with the Agreement—at least until it signed an agreement with Crest Tanker Officers Association in October, 1983. *Capital Times*, 44 LA 585 (1965).

case involves two different labor organizations which are in conflict over the right to perform certain work. Thus, according to the Company, this is a representation case, which should be heard and decided by a federal court, where all parties can be represented.

Both the Company and the Union have relied heavily on the decision of the U.S. Supreme Court in the case of *Carey v. Westinghouse*, 375 U.S. 261 (1964). In *Carey*, the employer was seeking to avoid arbitration of a dispute in which one union claimed that work being done by another union was more properly within the domain of the first union. The employer, viewing the matter as a jurisdictional dispute, preferred that it be settled at the National Labor Relations Board ("NLRB" or "Board"). The union which filed the grievance claimed that it was not a *jurisdictional* dispute, but rather a *work assignment* dispute, and pressed for arbitration.

The Court decided that how the case was defined was not the crucial issue in its resolution:

> However the dispute be considered—whether one involving assignment or one concerning representation—we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills a gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration may have a pervasive, curative effect even though one union is not a party. (375 U.S. 261, at 272)

The Arbitrator agrees with the Court's reasoning. The Court was attempting to resolve the issue in a manner congruent with the intent of Congress in passing the National Labor Relations Act:

> By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to "industrial peace" . . . and which

> may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at any time. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area. (375 U.S. at 272)

The Company contends that the reason the Court in *Carey* had no objection to the use of arbitration in that case was that the employees involved were covered by the protections of the National Labor Relations Act. They were "employees" under the meaning of that act, and could, therefore, invoke the provisions of the Act, including the authority of the National Labor Relations Board, if the dispute over representation was not resolved satisfactorily. Since the Trinidad case involves only *supervisory* employees, who are *not* covered by the National Labor Relations Act, recourse to the Board is not available. The Company argues, therefore, that *Carey* does not apply to the present case, and that the Arbitrator should not proceed with a decision because doing so would "almost surely serve to perpetuate the dispute, not end it" (Brief of the Company, p. 11).

The Arbitrator finds this reasoning unconvincing. As the Court said in *Carey*, the arbitration process may, in itself, provide a means for a total resolution of the dispute. On the other hand, if some parties to the arbitration process find its result unsatisfactory, they can file suit in federal court. Although the Arbitrator's decision will undoubtedly be given great deference in any later proceedings, that decision *might* be overturned if the court decided the Arbitrator proceeded improperly. Therefore, there is no substance to the argument that the Arbitrator should not proceed because the affected parties would have no recourse after his decision.

The Supreme Court affirmed this in *Carey*, with reference to the possibility of conflict between an Arbitrator's award and a later ruling by the National Labor Relations Board:

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; . . . But that is not peculiar to the present type of controversy. Arbitral awards construing a seniority provision . . . or awards concerning unfair labor practices, may later end up in conflict with Board rulings. . . . Yet, as we held in Smith v. Evening News Assn., supra, the possibility of conflict is no barrier to resort to a tribunal other than the Board. (375 U.S. at 272)

Finally, the Arbitrator is empowered and obligated by Section 2 of the collective bargaining Agreement to interpret the Agreement. That authority extends to interpretation of provisions within the Agreement which specify the extent of coverage of the Agreement. Section 36 of the Agreement deals with the coverage of the Agreement over employees of the various signatory parties. When a grievance is filed by one party or the other with respect to the meaning of that section, the Arbitrator has a responsibility under the contract to interpret the intent and meaning of Section 36 to the best of his ability. The possibility that his decision might be overturned later in court does not relieve him of his obligation.

The Arbitrator concludes, therefore, that he has jurisdiction over the present dispute.

The Merits of the Case

First, the Arbitrator must determine if Section 36 of the collective bargaining Agreement obligates the business entities known as "Crest Tankers, Inc." and "Clayton Tankers, Inc." to comply with the terms of the Agreement. Since these organizations are nominally not signatories to the Agreement, the issue in this case is whether these organizations were shown to have a relationship

with a signatory firm which obligates them (Crest and Clayton) to comply with the Agreement.

The Agreement itself deals with this issue. Thus, the signatory parties (Trinidad Corporation and the Union) have agreed that, under certain conditions, parties related to Trinidad shall be bound by the Agreement. These conditions are spelled out in Section 36 of the Agreement:

> This agreement covers all licensed marine engineers employed on U.S. flag ocean-going vessels, of whatever type, owned or operated (both at the present or any time during the life of this Agreement) by the Company or its subsidiary or affiliate, or by an entity for which the Company acts as a bargaining agent, and whether operated as an agent or including vessels owned by the Company or its subsidiary or affiliate and operated by another entity, but not including a vessel operated on a time charter basis.
>
> In the event the Company places into operation a new type of ocean-going vessel, the parties shall meet and negotiate such terms and conditions of employment as may be appropriate.
>
> The term "subsidiary" or "affiliate" shall be deemed to include any business entity whether corporate, partnership, trust or individual which is effectively controlled by or effectively controls the Company either directly or indirectly.
>
> The Union may in its discretion at any time require that any such subsidiary or affiliate execute this Agreement and a refusal to do so will give the Union the right upon a 10-day written notice to the Company to cancel this Agreement. The failure of the Union to request a subsidiary or affiliate to sign this Agreement shall not in any way affect the obli-

> gation of the Company herein that this Agreement does cover and include all the licensed engineers on all the vessels described above whether owned or operated by the Company or any of its subsidiaries or affiliates. (1981-1984 Tanker Service Vessels Agreement, pp. 95-96)

In other words, a firm *or any of its subsidiaries or affiliates* is required to comply with the Agreement if the firm itself is a signatory. According to testimony at the November 9, 1983, hearing, this provision was included in the Agreement to prevent companies (such as Trinidad) from creating complex structures of holding companies and subsidiaries simply to avoid complying with the Agreement.

The contract question that remains is whether the entities in this case (*Crest* and *Clayton*) represent "subsidiaries or affiliates" of Trinidad Corporation within the meaning of these terms in the Agreement. The Agreement defines the terms "subsidiary" or "affiliate" to include "any business entity whether corporate, partnership, trust, or individual which is effectively controlled by or effectively controls the Company either directly or indirectly." Thus, the Arbitrator must decide whether the relationships among Trinidad, Crest, and Clayton are such that they may be described as "subsidiaries" or "affiliates".

Evidence presented detailed the relationships among the various entities.[3] Trinidad is wholly owned by Apex

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[3] The Company contends that much of the evidence in the record concerning the organization of the various entities consists of hearsay admissions of various company officials contained in depositions taken in another proceeding and that the Arbitrator's decision should not be based upon such hearsay evidence. I reject the contention. First, I am aware of no restrictions that preclude an arbitrator from considering hearsay evidence or from basing a decision on such evidence. Second, admissions against interest, even in the form of depositions, are not "hearsay" and, in my view,

Shipping, which, in turn is wholly owned by Apex Holding. Apex Holding also wholly owns Crest Tankers and Clayton Tankers, which have both been created within the past two years. Apex Holding is itself wholly owned by Apex Oil. The same person serves as President and Chief Executive Officer of all the companies[4], there are a substantial number of common officers for all the companies, and the Boards of Directors of all are the same. Further, it appears that work is allocated to all vessels owned and/or operated by Trinidad, Crest and Clayton from one common source. Although it is claimed that each company establishes and runs its own labor relations programs and policies, no specific evidence was presented on this point, and the Union's evidence, although limited, tends to refute that claim.

Thus, in interpreting the Agreement, I find that the relationships among the various entities in this case represent precisely the kind of structure that much of Section 36 of the Agreement was developed to deal with. Accordingly, Apex Oil is obligated to comply with the terms of the Agreement, since it "effectively controls" Trinidad, through Apex Holding and Apex Shipping. In the same way, Apex Holding and Apex Shipping are obligated to comply with the Agreement. Further, since Crest and Clayton are "effectively controlled" by Apex Oil (through Apex Holding), Crest and Clayton are obligated to comply with the terms of the Agreement.

Finally, the Arbitrator finds that the Agreement, as interpreted, is not contrary to the law or public policy embodied in the National Labor Relations Act (the

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constitute acceptable evidence upon which I may base my decision. Federal Rules of Evidence 801(d)(2).

[4] Apparently another individual became President of Trinidad in October, 1983, but because that event occurred long after the Union's request that Crest and Clayton become bound to the Union's Agreement, it is not considered by this Arbitrator to have a meaningful bearing on this case.

"Act"). It is true that the engineers employed on the vessels owned and/or operated by Crest and Clayton have not expressed their desires to be represented by the Union or to be covered by its agreement. However, for the reasons summarized below, this Arbitrator finds, under the facts of this case, that neither representation of those engineers by the Union nor their coverage under the Agreement violates existing law or policy under the Act.

First, as the Company concedes in its argument concerning the jurisdiction of this Arbitrator, these engineers are all supervisors who are not covered by or protected by the provisions of the National Labor Relations Act.

Second, even if the engineers were protected "employees" under the Act, it appears from the record that Crest and Clayton are alter egos of Trinidad and, thus, would be bound to Trinidad's Agreement with the Union under the Act even if the Agreement did not so provide. In this connection, I considered the following facts: the extent of common ownership and control of the three companies (Trinidad, Crest, and Clayton); the timing of the formation of Crest and Clayton following Trinidad's Agreement with the Union; the common source which allocates cargos to all three companies; the similarity of vessels and cargos of all three companies; and the fact that Crest and Clayton own and/or operate only 8 of the 25 vessels owned and/or operated by the three companies.

Third, even if Crest and Clayton are not alter egos of Trinidad, based upon the facts outlined in the preceding paragraph, the record supports the further conclusion that all three constitute a single, common employer, and that the vessels and engineers of Crest and Clayton have been accreted to Trinidad's unit of engineers and are, accordingly, covered by Trinidad's Agreement with the Union. And this conclusion is enforced by the fact that the National Labor Relations Board normally finds that a

fleet-wide unit is appropriate in the shipping industry. *Moore-McCormack Lines, Inc.* 139 NLRB 796 (1962).

AWARD

Trinidad Corporation and its officers, agents, servants, employees, and attorneys, and all those persons in active concern or participation with them, shall:

1. Immediately cause Apex Oil, Crest, and Clayton to execute the Agreement.[5]

2. Immediately apply the terms of the Agreement to all licensed marine engineers employed on all vessels owned or operated by Crest or Clayton.

3. Pay to the Union, for the benefit of its members who have lost work as a result of the failure of Crest and Clayton to comply with the Agreement, the amount of wages that a full complement of engineers would have earned had they been employed on all vessels owned or operated by Crest and/or Clayton, from the time said vessels were acquired or operated by Crest and/or Clay-

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[5] The Company contends that the sole remedy for breach of Section 36 is the Union's right to cancel the Agreement and strike. However, Section 36 does not state that this is the sole remedy. Indeed, that section states that: "The failure of the Union to request a subsidiary or affiliate to sign the Agreement shall not . . . affect the obligation . . . of the Company . . . that this Agreement does cover . . . the licensed engineers . . . of its subsidiaries or affiliates." Further, the grievance and arbitration provisions of the Agreement (Section 2) provide that "all disputes relating to the interpretation or performance of this Agreement shall be determined in accordance with the provisions of this section." Accordingly, absent any evidence to the contrary, I interpret Section 36 as granting the Union alternative means of enforcing compliance with its provisions: either Agreement termination and striking *or* arbitration enforcement of the provisions of Section 36. As the Union has chosen the latter, I am obligated to enforce Section 36 and am not empowered, at least in this case, to terminate the parties' Agreement.

ton until such time as the licensed marine engineers employed thereon are covered by the Agreement.

4. Pay to the appropriate Benefit Plans the amount of contributions that would have been paid to said Plans under the Agreement had a full complement of engineers been employed on all vessels owned or operated by Crest and/or Clayton, from the time said vessels were acquired or operated by Crest and/or Clayton until such time as the licensed marine engineers employed thereon are covered by the Agreement.

5. Turn over to the Union all necessary documents to enable the Union to determine the lost wages and benefits suffered, calculated according to the methodology approved by the Council of Economic Advisers.

6. The Arbitrator retains jurisdiction in order to carry out all aspects of this award.

/s/ W.J. Usery, Jr.
W. J. USERY, JR.
Arbitrator

Dated: December 23, 1983